STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

In the Matter of the Application of
ILLUMINATE HOLDINGS, LLC,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION AND ORDER

-against-

CITY OF TROY ZONING BOARD OF APPEALS,
THE CITY OF TROY, and UNITED ARMENIAN
CALVARY CONGREGATIONAL CHURCH,

Respondents.

(Supreme Court, Rensselaer County, Motion Term, March 8, 2019)
Index No. 2018-259466
(RJI No. 01-17-125528)

(Acting Justice Michael H. Melkonian, Presiding)

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MELKONIAN, J.:

Petitioner commenced this CPLR Article 78 proceeding challenging a determination of the Zoning Board of Appeals of the City of Troy ("ZBA") dated March 28, 2018, which denied petitioner's application for area and use variances in relation to the development of property located at 144 9th Street, Troy, New York ("the property"). The petitioner sought approval to convert an existing vacant church into an apartment complex with parking. Initially, the application was approved by the ZBA in a 3-2 vote. On March 28, 2018, however, the ZBA notified the petitioner that the applications were denied as City of Troy Code § 285-31(c) required a majority vote with "the concurrence of four members" of the ZBA. In lieu of an answer, respondents the ZBA and the City of Troy ("respondents") moved to dismiss the petition pursuant to CPLR §§ 7804(f) and 3211(a)(2), (5), (7) and (8). Respondent United Armenian Calvary Congressional Church consented to the relief sought by the petitioner.

In a Decision and Order dated October 2, 2018, this Court converted the CPLR Article 78 action, which sought to declare the Troy City Code unconstitutional to a declaratory judgment and held the case "may proceed as a hybrid one for declaratory and Article 78

relief." This Court also denied the motion to dismiss the action as untimely and found "there is a legitimate question as to whether the statutory language found in the General City Law preempts the statutory language in § 285-31 of the Code." The respondents served a Verified Answer on or about February 14, 2019 and, again, allege that the area and use variances were properly denied, the Article 78 proceeding is an improper proceeding to challenge the constitutionality of Troy City Code § 285-31(c), the action is time-barred and Troy City Code § 285-31(c) was not preempted by New York State General City Law § 81-a or New York Municipal Home Rule Law §§ 10 and 22(2).

Initially, the petitioner maintains respondent's Answer is untimely and it should not be considered by the Court. The petitioner alleges CPLR § 7804(f) provides that "if a motion is denied, the court shall permit the respondent to answer, upon such terms as may be just; and unless the order specifies otherwise, such answer shall be served and filed within five day after of the order with notice of entry." The petitioner contends that the October 2, 2018 Decision and Order of this Court was entered with the Office of the Rensselaer County Clerk on November 26, 2018 and served upon the respondents on December 18, 2018. The petitioner claims the Answer is untimely as it was not served until February 14, 2019. The petitioner also alleges that the respondents failed to serve a copy of a certified transcript as required by CPLR § 7804(e) and failed to file an Affidavit with the Answer.

The respondents maintain that CPLR § 7804(f) does not set forth an automatic default provision. The respondents claim a default judgment can only be awarded on motion and the

petitioner failed to move for a default. The respondents allege that they anticipated participating in a scheduling order conference after the motion to dismiss the petition was denied. The respondents allege the petitioner never entered the original Decision and Order until November 26, 2018 and they were never served until December 18, 2018, two and one-half months after the Order was signed. The respondents maintain the delay was not overly lengthy or willful and the petitioner has not demonstrated any prejudice as it submitted an Affidavit in Opposition to the Answer on March 1, 2019. The respondents also claim they prepared and served an Administrative Record with the Answer. The respondents allege that since the ZBA did not maintain a transcript of the proceedings, they were unable to produce that record. In addition, the respondents contend that an Answering Affidavit is not required to be served with the Verified Answer.

In general, in order to be relieved of a default judgment, a defendant must show a reasonable excuse for the default, that the default was not willful, a meritorious defense to the action and that the delay has not prejudiced the plaintiff (Dodge v Commander, 18 AD3d 943, 945 [3rd Dept. 2005]; Aaron v Carter, Conboy, Case, Blackmore, Napierski & Maloney, 12 AD3d 753 [3rd Dept. 2004]). What constitutes a reasonable excuse for a default in answering lies within the sound discretion of the court (Hayes v Village of Middleburgh, 140 AD3d 1359 [3rd Dept. 2016]; see, Doane v Kiwanis Club of Rotterdam, N.Y., Inc., 128 AD3d 1309 [3rd Dept. 2015]).

Pursuant to CPLR § 3012(d), "the court may extend the time to appear or plead, or

compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." CPLR § 2001 provides "at any stage of an action . . .the court may permit a mistake, omission, defect or irregularity . . . to be corrected, upon terms as may be just, or if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded." In addition, CPLR § 2004 grants the Court discretion to "extend the time fixed by any statute, rule or order. . . upon such terms as may be just."

It appears both parties have been dilatory in the service of the Decision and Order in December 2018 and the Answer in February 2019. This Court adheres to the policy of favoring the resolution of an action on the merits rather than by dismissal or default (Luderowski v Sexton, 152 AD3d 918 [3rd Dept. 2017]). The Court shall utilize its discretion pursuant to CPLR §§§ 2001, 2004, 3012 and accept the service of the Answer (Spence v Davis, 139 AD3d 703 [2nd Dept. 2016]). Considering the absence of prejudice to the plaintiff, the meritorious nature of the defense, the lack of willfulness and the public policy in favor of resolving cases on the merits, respondents' delay in answering the petition is excused (Li v Caruso, 161 AD3d 1132 [2nd Dept. 2018]; Gonzalez v Seejattan, 123 AD3d 762 [2nd Dept. 2014]).

The judicial standard of review of administrative determinations pursuant to CPLR Article 78 is whether the determination is arbitrary and capricious, and a reviewing court is therefore restricted to an assessment of whether the action in question was taken "without

sound basis in reason and . . . without regard to the facts." (see, CPLR § 7803; In the Matter of Murphy v New York State Division of Housing and Community Renewal, 21 NY3d 649 [2013]; Matter of Pell v Board of Education, 34 NY 2d 222 [1974]). The test usually applied in deciding whether a determination is arbitrary and capricious or an abuse of discretion is whether the determination has a rational or adequate basis (Matter of Peckham v Calogero, 12 NY3d 424 [2009]). The reviewing court in a proceeding pursuant to CPLR Article 78 will not substitute its judgment for that of the agency unless it clearly appears to be arbitrary, capricious or contrary to the law (Paramount Communities, Inc v Gibraltar Cas Co., 90 NY2d 507 [1997]).

"When the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference." Matter of Flacke v Onondaga Landfill System, 69 NY2d 355 (1987). Moreover, in order to maintain the limited nature of review, it is incumbent upon the court to defer to the agency's construction of statutes and regulations that it administers as long as that construction is not irrational or unreasonable (Matter of 427 W. 51 St. Owners Corp. v Division of Hous. And Community Renewal, 3 NY3d 337 [2004]; Lorillard Tobacco Co. v Roth, 99 NY2d 316 [2003]).

Initially, the ZBA approved the petitioner's variance applications by a vote of 3-2. Subsequently, the ZBA informed the petitioner that Troy City Code § 285-31(c) required a super majority of four out of five members to approve a variance petition. General City Law

§ 81-a requires approval by a majority of the ZBA members regardless of vacancies or absences in deciding ZBA appeals. The petitioner maintains the Troy City Code acknowledges that it is subject to the provisions of Article 5a of the General City Law § 81-83-a pursuant to Troy City Code §§ 285-3, 285-29 and 285-36. Troy City Code § 285-36 clearly states that "Hearings of the Board of Appeals shall be held as set froth in General City Law § 81-a."

The petitioner claims Troy City Code § 285-31(c) is in direct conflict with General City Law § 81-a as the Troy Code requires a vote of a super majority of members of the ZBA versus a simple majority of ZBA members. Local home rule power is subject to a fundamental limitation by the preemption doctrine (Matter of Cohen v Board of Appeals of Vil. of Saddle Rock, 100 NY2d 395 [2003]). State preemption occurs when a local government adopts a law that directly conflicts with a State statute or when a local government legislates in a field for which the State legislature has assumed full regulatory responsibility (DJL Rest. Corp. v City of New York, 96 NY2d 91 [2001]). Conflict preemption occurs when a local law prohibits what a state law explicitly allows (Zorn v Howe, 276 AD2d 51, 55 [3rd Dept. 2000]).

Municipal Home Rule Law § 22 requires that any local law that is intended to supersede a state statute must specify the state law it is superceding (Viscio v Town of Wright, 42 AD3d 728 [3rd Dept. 2007]). There must be a clear statement by the local legislature of its intent to amend or supercede a state law, or any portion thereof, by its

substantial adherence to those statutory methods (Turnpike Woods v Town of Stony Point, 70 NY 2d 735 [1987]).

A review of the Troy City Code that requires a super majority vote of ZBA members does not state that it was the intention of the City of Troy to supersede the majority vote requirement by the ZBA members as required by General City Law § 81-a. The ZBA majority vote established by NYS General City Law preempts the City of Troy's Code, which requires a vote of a super majority of the ZBA members (Wright v Rezendez, 90 AD3d 1388 [3rd Dept. 2011]). As a result, the determination of the ZBA was arbitrary and capricious.

The Court notes the issues of a constitutional challenge to a legislative enactment by a CPLR Article 78 proceeding and the statute of limitations were addressed in the prior Decision and Order of this Court. The Court has reviewed the parties remaining contentions and concludes they either lack merit or are unpersuasive given the Court's determination. (Hubbard v County of Madison, 71 AD3d 1313 [3rd Dept. 2010]).

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the petitioner. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Troy, New York

Dated: June 18, 2019

MICHAEL H. MELKONIAN
Acting Supreme Court Justice

Papers Considered:

(1) Notice of Petition dated April 23, 2018;
(2) Petition dated April 23, 2018, with exhibits annexed;
(3) Verified Answer dated February 14, 2019;
(4) Memorandum of Law dated February 14, 2019;
(5) Administrative Record certified February 14, 2019;
(6) Affirmation of Michael E. Ginsburg, Esq., dated March 1, 2019, with exhibits annexed;
(7) Memorandum of Law dated March 1, 2019; and
(8) Reply Affirmation dated March 7, 2019.